Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-5441

ERIC STEWART ROBINSON, a minor by his Guardian ad Litem, EDWARD J. COE,
Appellant,

vs.

PATRICK A. KOLSTAD and ALLSTATE INSURANCE COMPANY,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

MOTION AND BRIEF IN SUPPORT OF MOTION TO AFFIRM DECISION OF THE SUPREME COURT OF THE STATE OF WISCONSIN

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MOTION TO AFFIRM

Appellees, Patrick A. Kolstad and Allstate Insurance Company, move the Court to affirm the Judgment of the Wisconsin Supreme Court on the grounds that it correctly determines that the statute in question is the reasonable means of proof called for in *Trimble v. Gordon*, 430 U.S. 762 (1977) and is consistent with the constitutional principles elaborated therein.

DATED this 30th day of September, 1978.

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THE STATUTE INVOLVED

The statute involved in this suit, Wis. Stat. 852.05 (1) is the statute that determines both the status of illegitimate persons for purposes of intestate succession and the status of illegitimate persons for purposes of determining beneficiaries under the wrongful death statute where no spouse survives and is as stated in appellant's Jurisdictional Statement.

QUESTION PRESENTED

Should the decision of the Wisconsin Supreme Court determining that sec. 852.05 (1) Stats. prescribes reasonable means of proof of paternity for a posthumous illegitimate child who maintains an action for the death of his putative father under the wrongful death statutes is constitutional and is not a denial of equal protection under the 14th Amendment, be affirmed?

STATEMENT OF FACTS

The facts are as stated in the opinion of the Wisconsin Supreme Court found on pages 2 and 3 of Appendix A of appellant's Jurisdictional Statement. In addition to the facts stated by appellant the following additional facts are pertinent.

> "On August 3, 1973, Larson's mother, a recognized lineal heir under the Wisconsin statutes, commenced a wrongful death action against the defendants. On July 15, 1974, that action was dismissed upon stipulation of the parties and upon payment by the defendant, Allstate Insurance Company, of $7,654.81 in settlement of the wrongful death claim.
>
> "On December 30, 1976, the instant action was commenced.
>
> "This appeal concerns the narrow question of whether a posthumous illegitimate child may maintain an action for the death of his putative father under the wrongful death statutes. Secs. 895.01, 895.03 and 895.04, Stats.
>
> "In defining the party-plaintiffs in a wrongful death action, sec. 895.04 (2), Stats., provides that the amount recovered in such action belongs '... to the deceased's lineal heirs as determined by s. 852.01 ...' if there is no surviving spouse." A. 2a-3a.

STANDARD OF REVIEW

In *Trimble v. Gordon* this Court prefaced its decision by stating

> "this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose, citing *Weber v. Aetna Casualty & Surety Co.* (1972), 406 U.S. 164, 172. *Trimble v. Gordon,* 430 U.S. 762, 97 S.Ct. at 1459, 52 L.Ed. 2d at 37 (1977). The Court thereby affirmed its earlier decisions and refused to find classification based on illegitimacy as 'suspect' so that any justification must survive a 'strict scrutiny.'"

I. There Are No Substantial Federal Questions Presented By This Appeal.

A. The statute in question provides the middle ground called for in *Trimble v. Gordon* of reasonable means of proof of paternity for illegitimate children. The Wisconsin Court held,

> "Sec. 852.05 (1), Stats., prescribes reasonable means of proof of paternity for illegitimate children. There is no separate statutory classification for children born out of wedlock. Under no construction of the statutes can it be said that there is a statutory disinheritance of illegitimate children. In addition to the legitimization of children by such procedures as subsequent marriage of the parents and adoption, sec. 852.05 (3), paternity may be shown by an adjudication in paternity proceedings, by oral or written admissions of the father in open court, or by acknowledgment in writing signed by the putative father

without a witness. The only types of proof excluded by the statutes are oral admissions outside of court or unsigned written acknowledgments. Sound policy reasons for these legislative exclusions are readily apparent." A. 4a.

The decision in the case at bar was decided on even date with the decisions of *In Re Estate of Blumreich* and *Caldwell v. Estate of Blumreich* found in Appendix D of appellant's Jurisdictional Statement and the court holds that the decisions in the *Blumreich* cases are dispositive of this matter. The *Blumreich* cases involved an illegitimate child born after the death of his putative father who sought to commence both an action for the wrongful death of the putative father and to inherit from his estate but was also unable to satisfy the requirements of sec. 852.05 (1) Stats. and it is necessary to read these decisions to determine the reasoning behind the court's decision in this matter.

In *Blumreich* and by necessity in the case at bar the court held that states may prescribe reasonable requirements requiring proof of paternity in both determining beneficiaries under the wrongful death actions and in determining heirs in intestate proceedings. The court did so by applying the principles of *Trimble v. Gordon,*

> "Applying these principles to the instant case, we conclude that sec. 852.05 (1), Stats., constitutes a 'carefully tuned' statute sensitive to the conflicting considerations emphasized in *Trimble, supra.* There is no evidence that this statute reflects an impermissible effort to influence the conduct of parents by imposing sanctions on their illegitimate children. Indeed,

> the statutory provisions do not distinguish between legitimates and illegitimates so much as they distinguish among various categories of illegitimates, and they specifically allow proof of paternity by either of the two methods identified in *Trimble, supra,* as accurate and reliable: prior adjudication and formal acknowledgment.
>
> "We believe the exclusion of other forms of posthumous proof of paternity represents a reasonable effort '... to eliminate imprecise and unduly burdensome methods of establishing paternity.' *Trimble v. Gordon, supra,* at 772, *fn.* 14. It has been said that the accusation of paternity is easy to make but difficult to defend against. *See, e.g.: In re Commissioner of Social Services,* 70 Misc. 2d 581, 333 N.Y.S. 2d 621, 623 (1972). To permit paternity to be established after the death of the putative father, on the basis of his alleged informal, verbal statements would be to place his estate at an unreasonable disadvantage in defending against spurious claims. The decedent would be unavailable to assert defenses or to assist in the cross-examination of his accusers. Information about his blood, which might conclusively eliminate him as the father, might not be available to his estate. His death thus undermines the reliability of the fact-finding process, and it is not unreasonable to require that a posthumous claim of paternity be supported by the types of documented evidence approved under sec. 852.05 (1), Stats.
>
> "In addition, the statutory methods of proof avoid the extended uncertainty which would otherwise plague estate proceedings and wrongful death actions. It is apparently the

petitioner's position that paternity may be established on the basis of undocumented evidence adduced at any time during the applicable period of limitations. Such an approach would produce intolerable confusion. Potential heirs and claimants could not be identified with confidence until after the period of limitations had elapsed. The lurking possibility that an unknown putative child would come forward at some future time would frustrate the orderly settlement of estates and resolution of wrongful death claims. By requiring that paternity be evidenced in a recorded form during the fathers life, sec. 852.05 (1), Stats., reduces the likelihood that an unexpected claimant will appear years in the future. The statute thus serves the state's substantial interest in providing for the prompt and definitive determination of the valid ownership of property left by decedents, and such statutes are entitled to a degree of judicial deference." *Trimble v. Gordon, supra,* at 767, 768, *fn.* 12.

"Proof of paternity by posthumous second-hand testimony would be imprecise, unreliable and susceptible to fraudulent claims, and would inject intolerable uncertainty into estate proceedings and wrongful death actions. Because such posthumous proof would compromise the valid interests of the state, it is not unreasonable to require that paterntiy be adjudicated, or acknowledged in open court or in writing by the putative father." ... A. 11d-12d

"This observation is equally true of sec. 852.05 (1), Stats. The methods of proof prescribed there do not represent a moral, social or

ethical disparagement of illegitimacy, and are not intended to mold the conduct of the parents. They are intended only to serve the state's legitimate interest in the accurate and orderly settlement of estates by requiring that paternity be established with a degree of formality and in a recorded form which will assure reliability and avoid extended uncertainty."... A. 13d

"The requirements of sec. 852.05 (1), Stats., constitute similar presumptions in aid of administrative functions; by requiring that paternity be shown from relatively readily documented facts, they safeguard the accuracy, integrity and finality of intestate succession. Like the statutory classifications upheld in *Mathews v. Lucas, supra,* sec. 852.05 (1) marks a constitutionally permissible 'middle ground between the extremes of complete exclusion and case-by-case determination of paternity.'" *Trimble v. Gordon, supra,* at 771.

"The instant petitioner further argues that sec. 852.05 (1), Stats., effectively 'creates an insurmountable barrier' to inheritance or commencement of a wrongful death action by an illegitimate born after the death of the putative father. Amicus curiae Wisconsin Judicare joins in this argument, and contends that sec. 852.05 (1) denies an afterborn illegitimate due process of law because the child has no opportunity to establish his paternity. This 'insurmountable barrier' argument is a formulation of the much-criticized 'irrebutable presumption doctrine'." ... A. 15d

"Sec. 852.05 (1), Stats., similarly prescribes alternative methods by which an illegitimate

may establish a right to inherit from his father. There is no question that he may inherit if the father executes a will naming him a beneficiary. If the father dies intestate, the child may prove paternity by showing that his parents inter-married, that his father acknowledged paternity in open court or in a signed writing, or that an adjudication of paternity was made during the father's lifetime. These alternative methods of proof are more varied, and certainly no more onerous, than those approved in *Labine, supra,* and therefore cannot be said to deny the petitioner due process of law." A. 11d

Sec. 852.05, Stats., is much broader than the Illinois statute in *Trimble* and the Louisiana statute in *Labine.* In addition to statutes legitimizing by subsequent marriage of the parents or by adoption, and statutes presuming children born during a marriage to be legitimate and declaring a child born to a married couple is legitimate even though the marriage is subsequently declared void, sec. 852.05 (1), Stats., legitimizes children by adjudication in a paternity proceeding, by oral or written admissions by the father in open court or by acknowledgement in writing signed by the father without a witness. All that is not included by the Wisconsin Legislature are oral admissions outside of court or an unsigned written acknowledgement both of which are pregnant with fraud and false claims.

It is therefore appellees' position that *Trimble v. Gordon* is to be cited in support of the constitutionality of sec. 852.05 (1), Stats., as by its enactment our legislature created a constitutionally justifiable middle ground between the extremes of complete exclusion and a case-by-case determination.

Keith Larson had available to him, prior to his death, the means of legitimizing the appellant. He could have acknowledged himself to be the father in a writing signed by himself, he could have acknowledged himself to be the father in open court, and he could have entered into a paternity agreement with the district attorney. He did not do so. It may well be he did not because the plaintiff is not his child. Had he done so, he would have had a duty to support under sec. 52.51 (2), Stats., and likewise would have legitimized the respondent pursuant to the provision of sec. 852.05 (1), Stats.

His failure to do so resulted in his mother being the primary beneficiary for any action under the wrongful death statute and in reliance on the statutes of Wisconsin and the decision in *Krantz v. Harris,* 40 Wis. 2d 709, 162 NW 2d 628 (1968), the defendants in this case settled the mother's claim under the wrongful death statute, an act the appellant now requests the Court to construe as improper, many years later.

It could also be that he did not establish paternity because he did not have time to do so, his death occurring, according to the pleadings, within a few days of his being informed that appellant's mother was pregnant. However, does the brief period of time in which Keith Larson had to act, render the statute in question unconstitutional on the grounds that it denies equal protection to the appellant? We think not. Is this situation any different than where a father decides to leave all of his property to one of his children and dies in an automobile accident, after consulting with his lawyer, but before he signs his will? Or is it any different where a groom dies after he and his bride apply for a marriage license but before the

wedding? In the first hypothetical all of the children will inherit equally to the detriment of the favored child. In the second, the groom's parents will inherit and the bride-to-be will receive nothing. Both the favored child and the bride-to-be, by operation of the law, are treated less favorably than if the intention of the decedent had been reduced to writing in the form of a will before he died. Death, in these situations, is an intervening circumstance over which the legislature has no control and certainly is not a circumstance protected by the adoption of the equal protection clause of the Fourteenth Amendment to the United States Constitution. The problem here lies not with the Wisconsin statute. It lies with the untimely death of Keith Larson.

As Justice Rehnquist stated in his well reasoned dissent in *Trimble:*

> "For equal protection does not mean that all persons must be treated alike. Rather, its general principle is that persons similarly situated should be treated similarly." *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. at 1470, 52 L.Ed. 2d at 45 (1977).

We respectfully submit to the Court, that nothing in the enactment of the Fourteenth Amendment in establishing equal protection addresses itself to the untimely death of the putative father of an illegitimate child for the purposes of bringing an action under the wrongful death statute or for purposes of inheriting under the laws of intestate succession where the statutes in question are as liberal and broad as can be in protecting the rights of illegitimates and the fact the putative father was unable to avail himself of the benefits of the statute is due solely to his untimely death.

We submit that to hold sec. 852.05 (1), Stats. unconstitutional under the facts of this case would be to place the statute on a procrustean bed to fit a claim of denial of equal protection because of the untimely death of a putative father. The statute in question does not present an insurmountable barrier. Death presents the barrier, as it does in all facets of life.

We further submit that it was the untimely death of Keith Larson that resulted in his mother being the beneficiary under the wrongful death statute and appellant is excluded because of this occurrence, not because the law of intestate succession as it applies to illegitimates denies him equal protection.

B. The decision of the Wisconsin Supreme Court is based entirely on *Trimble v. Gordon* and should be affirmed.

As is readily apparent from the well reasoned decision of the Wisconsin Supreme Court in the instant case and in the companion *Blumreich* cases the Wisconsin Court carefully analyzed the Wisconsin Statute in question in light of the decision of the court in *Trimble v. Gordon* and its preceding cases and correctly determined that the statute in question is the middle ground called for in said decision and is consistent with the constitutional principles elaborated therein.

CONCLUSION

For the foregoing reasons the decision of the Wisconsin Supreme Court should be affirmed.

Respectfully submitted,

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